87-1835

No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

CALIFORNIA ENERGY RESOURCES
CONSERVATION
AND DEVELOPMENT COMMISSION,

Petitioner,

vs.

BONNEVILLE POWER ADMINISTRATION;
JAMES J. JURA, as Administrator;
JOHN S. HERRINGTON, as Secretary of
the Department of Energy of
the United States of America;
and the UNITED STATES OF AMERICA,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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QUESTIONS PRESENTED

1. Whether the Bonneville Power Administration violated its statutory mandate to provide interregional electricity transmission services "as a carrier" (16 U.S.C. §837e) to "all utilities on a fair and nondiscriminatory basis" (16 U.S.C. §838d) by adopting a transmission policy that discriminates in favor of Northwest utilities and against California and Canadian utilities and California ratepayers.

2. Whether a federal proprietary agency must formulate its sales and marketing policies in a manner consistent with the Nation's antitrust laws to the maximum extent feasible.

LIST OF PARTIES

The parties to the proceeding below were petitioner California Energy Resources Conservation and Development Commission (CEC) and respondents Bonneville Power Administration (BPA), James J. Jura as Administrator of BPA, John S. Herrington as Secretary of the Department of Energy of the United States of America, and the United States of America. In addition, the Public Utilities Commission of the State of California (CPUC) was a petitioner below.

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MISCELLANEOUS

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Petitioner California Energy Resources Conservation and Development Commission (CEC) respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Ninth Circuit in this case.

OPINIONS BELOW

The opinion of the Court of Appeals is reported at 831 F.2d 1467 (hereafter "*CEC*") and reproduced at Appendix A. The opinion in an earlier related case, *Department of Water and Power of the City of Los Angeles v. Bonneville Power Administration*, 759 F.2d 684 (9th Cir.

1985) (hereafter "*LADWP*") is reproduced at Appendix B.[1]

JURISDICTION

The opinion and judgment of the Ninth Circuit was entered on November 6, 1987 and amended sometime thereafter. A timely petition for rehearing was denied on February 4, 1988 in an order reproduced as Appendix C. This Court has jurisdiction pursuant to 28 U.S.C. §1254(1).

PRINCIPAL STATUTES INVOLVED

Section 6 of the Act of August 31, 1964 (sometimes referred to as the "Regional Preference Act"), 16 U.S.C. §837e, provides in pertinent part:

> Any capacity in Federal transmission lines connecting, either by themselves or with non-Federal lines, a generating plant in the Pacific Northwest or Canada with the other area or with any other area outside the Pacific Northwest, which is not required for the transmission of Federal energy [or Canadian Treaty energy], shall be made available as a carrier for transmission of other electric energy between such areas.

Section 6 of the Federal Columbia River Transmission System Act of 1974, 16 U.S.C. §838d, provides in full:

> The Administrator shall make available to all utilities on a fair and nondiscriminatory basis, any capacity in the federal transmission system which he determines to be in excess of the capacity required to transmit electric power generated or acquired by the United States.

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[1] Citations to the Appendix will be noted as "A. at ____ ."

Additional statutory provisions involved in this case are 16 U.S.C. §§832a(b), 837(c), 837(d), and 837a. Each is set forth verbatim in Appendix K.

STATEMENT OF THE CASE

A. Introduction

This case involves an anticompetitive policy adopted by a federal proprietary agency, the Bonneville Power Administration (BPA), that discriminates against California utilities and their ratepayers to the benefit of utilities in the Pacific Northwest. The discrimination occurs in BPA's allocation of federally-owned capacity on an electric transmission system known as the "Pacific Intertie." The policy will produce a transfer of wealth between regions of the United States on the order of billions of dollars.

A divided panel of the Ninth Circuit, acting pursuant to its original jurisdiction (16 U.S.C. §839f(e)(5)), found that the policy is anticompetitive but nonetheless upheld it. A. at A16-A20. Dissenting Judge Norris noted that the policy "creates a cartel for the Northwest utility companies in the sale of power to the Southwest . . . [and] seems plainly incompatible with the statutory language requiring that the BPA be 'fair and non-discriminatory' in its treatment of *all* utilities . . . ." A. at A26-A27 (emphasis in original).

B. Factual Background

BPA is a federal power marketing agency created to sell federal electricity generated in the Pacific Northwest. 16 U.S.C. §§832, 837-839. BPA was formed in part "to prevent the monopolization [of federal energy] by limited groups" and, in order to help realize that purpose, was

authorized to construct and own transmission lines. 16 U.S.C. §832a(b).

BPA owns and operates almost all of the northern end of the Pacific Intertie, which links the Pacific Northwest and Canadian power markets with the California power market.[2] A. at B3. The southern end of the Intertie is owned by a group of publicly and privately owned utilities. A. at L7. In order for energy sellers and buyers in the Northwest, Canada, and California to consummate mutually beneficial power sales and exchange[3] transactions between regions, they must have access to the Intertie. A. at L9.

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[2] The historical facts concerning the development and ownership of the Intertie are well summarized in an initial decision by an administrative law judge of the Federal Energy Regulatory Commission (FERC) in a case concerning claims that certain of the California owners of the southern end of the line should be required to provide increased access to California municipal utilities who do not own any Intertie capacity. *Pacific Gas and Electric Co.*, FERC Docket E-7777-000, Initial Decision, 26 FERC (CCH) ¶63,048, pp. 65,178, 65,195-202 (1984) (hereafter "Quad-7 Initial Decision"). The decision currently has no force of law and many of its legal conclusions are being contested before the FERC, but the historical discussion is largely uncontested and provides helpful factual background. Therefore, it is reproduced in Appendix L. In that discussion, the administrative law judge noted:

> The Pacific Intertie is considered to be the greatest electrical transmission achievement in this country in this century. It established high voltage, high volume, long distance transmission between northern Oregon and its terminal near Los Angeles, the greatest distance over which commercial electrical transmission had ever been accomplished in this country, and in the greatest volume that long distance transmission had ever reached anywhere in the world.

A. at L1.

[3] Seasonal power exchanges over the Intertie, in particular, are beneficial to both regions because the peak demands for electricity in many parts of the two regions occur at different times of the year.

This proceeding involves BPA's decision in 1984 to change the manner in which it provides access to the federally-owned portion of the Intertie.

Until the Intertie became operational in 1969, BPA's marketing area was limited to the Northwest. Although the concept of linking the Northwest and California power markets through an intertie had been proposed many times since the 1940s, a serious political obstacle had to be overcome before the Intertie could become a reality. This obstacle was the fear of Northwest interests that the Intertie would enable California municipal utilities to obtain priority rights to inexpensive BPA hydropower pursuant to the statutory preference publicly-owned utilities enjoy for the purchase of federal energy. *See, e.g.*, 16 U.S.C. §832c; A. at L13-L16. This political problem was resolved by the enactment of a "regional preference" to BPA power which restricted the sale of federal energy outside the Northwest to "surplus energy" for which BPA had no market in the Northwest. 16 U.S.C. §§837(c), 837a. The compromise protected the Northwest's first call on BPA power — although it said nothing about access to transmission facilities — and, at the same time, allowed BPA to generate additional revenues by selling hydropower to California that otherwise would be wasted. *See* H.R. Rep. No. 590, 88th Cong., 2d Sess., *reprinted in* 1964 U.S. Code Cong. & Admin. News 3342, 3343-44.[4]

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[4] A Federal Power Commission (FPC) report to Congress on the 1964 Regional Preference Act estimated that "[a]bout 6 billion kilowatt-hours of surplus energy which could have been transmitted during 1962 from the Bonneville system to the Pacific Southwest, if such a tieline had been in existence, were wasted to the sea. Estimates of the revenue value of this wasted energy approach $12 million." H.R. Rep. No. 590, 88th Cong., 2d Sess., *reprinted in* 1964 U.S. Code Cong. & Admin. News 3342, 3354. The FPC report thus assumes the energy would have been sold at about two tenths of a cent per kilowatt hour. BPA now markets the same energy at about ten times

The federal portion of the Intertie (consisting of most of the facilities north of the Oregon border) was financed through U.S. taxpayer funding. The U.S. Treasury is being repaid over time through user charges assessed for transmission services.[5] The southern portion of the Intertie (located south of the Oregon border in California and Nevada) was constructed and paid for primarily by California utilities, who recoup their substantial investment in the Intertie by making beneficial purchases of low cost energy from time to time and by engaging in seasonal exchange transactions. The differences between these methods of financing, and the resulting patterns of ownership at either end of the line, were understood and accepted by BPA and by Congress itself when it authorized the construction of the Intertie in 1964. H.R. Rep. No. 590, 88th Cong., 2d Sess., *reprinted in* 1964 U.S. Code Cong. & Admin. News 3342, 3390-93. BPA's current refusal to accept the implications of these differences is central to the present dispute.

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that price.

Moreover, in a good water year, such as 1982, 1983, or 1985, BPA can sell about three times as much surplus energy to California as was available in 1962. *See* BPA 1982 Annual Report 45 (1982) (16.7 billion kWh); BPA, 1983 Program and Financial Summary 29 (1983) (19.8 billion kWh); BPA, 1985 Program and Financial Summary 33 (1985) (17.3 billion kWh). Thus BPA can realize up to 300 to 400 million dollars a year of revenue from Intertie transactions. This accounts for about 60 percent of the Northwest energy sold to California. Therefore, small differences in the price that can be charged have dramatic potential for transferring wealth. *See also infra* note 18.

[5] In establishing rates for power sales and transmission services, BPA must separately track and account for the costs of the federal generation and transmission systems and is prohibited from using revenues from either system to subsidize the other. *U.S. Dep't of Energy, Bonneville Power Administration*, 26 FERC (CCH) ¶61,096, p. 61,237 (1984); *see* 16 U.S.C. §§837e, 838g, 838h, and 839e(a).

When Congress authorized construction of the Intertie in 1964, it directed BPA to make Intertie capacity that it does not need for transmission of federal energy (and Canadian Treaty energy[6]) available to others "as a carrier." 16 U.S.C. §837e. In 1974, Congress again directed BPA to make excess Intertie capacity available to "*all* utilities" on a "fair and nondiscriminatory" basis. 16 U.S.C. §838d (emphasis added). Thus the statutes authorized a preference only for federal energy and Canadian Treaty energy transmitted over the Intertie. Beyond those two preferences, there was to be no discrimination in allocating transmission capacity.

For 20 years after the Intertie was authorized, BPA gave these statutes a plain, common-sense interpretation: BPA reserved the capacity it needed to transmit federal energy that it sold to California utilities, but it made the remaining capacity available to other utilities based on free market allocation. The only exception was when the Northwest hydroelectric system was in a "spill" condition, that is, when Northwest dams were essentially overflowing.[7] At all other times, Northwest and

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[6] Canadian Treaty energy is a large quantity of energy for which the United States agreed to provide a market in exchange for Canadian agreement to coordinate hydroelectric development of the Columbia River. In the Quad-7 proceeding, former BPA Administrator Charles Luce testified that the Intertie was made possible by bringing together BPA's desire for a treaty with Canada, Canada's desire for a market for its share of the energy created by coordination of the river system, and California's desire to obtain inexpensive Canadian power. A. at L10-L13. Canadian Treaty energy has the same preference to Intertie capacity as federal energy. 16 U.S.C. §837e.

[7] A "spill" condition exists when the predominantly hydroelectric generation system in the Northwest experiences streamflows in excess of the storage capability of the dams on the Columbia River system. During these "spill" conditions, all Northwest loads are met by hydroelectric generation and "must-run" thermal generation (such as nuclear facilities at Hanford military reservation). When this

Canadian sellers of energy competed among themselves and with BPA for available California buyers of energy. BPA provided access on a competitive, first-come-first-served basis to parties who had successfully negotiated energy transactions.[8]

In the early 1970s, BPA forecast that the Northwest would soon face energy demands in excess of the region's generating capacity. Those forecasts led BPA to underwrite construction of three very expensive nuclear facilities. *See City of Springfield v. WPPSS*, 752 F.2d 1423, 1425 (9th Cir. 1985). Unfortunately, BPA's forecasts proved to be wrong, and, in the early 1980s, BPA was forced to halt construction of two of the three facilities indefinitely. The construction costs of these "mothballed" plants nonetheless added substantial debt to the federal generation system and forced BPA to adopt painful rate increases for all of its power customers.

In order to keep the rate increases for its Northwest customers as low as possible, BPA sought ways of increasing its revenues from sales of surplus energy to California. More revenue could have been raised by

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happens, available hydroelectric energy must either be generated immediately for sale outside the Northwest or the water will spill over the dams or past unloaded turbines and be wasted. Spill conditions tend to happen in the Spring.

[8] During periods of "spill," BPA moderated this competitive effect by allocating capacity on the Intertie under an agreement known as the "Exportable Energy Agreement." This agreement provided for pro rata allocation of the Intertie among Pacific Northwest sellers based on the amount of energy each had for sale at BPA's "applicable rate." A. at A6, M5-M6, M10-M12, M24-M27.

The Exportable Energy Agreement protected each seller from price competition, but did so only during the portions of the year when such competition could drive the price of energy very close to zero because the energy would be immediately wasted if not sold. It also historically provided some protection to buyers, however, because the requirement that sellers had to sell at the "applicable" BPA rate prevented price gouging. *See infra* note 13.

increasing the *amount* of federal energy BPA sells to California (especially during spill conditions when BPA wastes large volumes of federal power in order to make part of the Intertie available to other Northwest utilities). Instead, BPA chose to try to increase its revenues by substantially increasing the *rates* it charged its California customers.[9] This, in turn, had a marked effect on demand for access to the Intertie.[10]

C. The Intertie Access Policy

Before 1984, BPA had maintained its California market by underselling its competitors. A. at B7. In 1984, however, BPA adopted an Intertie Access Policy that eliminated all competition from other Northwest and

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[9] The average price of federal energy sold to California (under spill and all other conditions) rose from 1.46 cents per kWh in the last 4 months of 1983 to 2.6 cents per kWh during the first four months under the Access Policy. A. at H23, H91.

[10] As BPA increases its "applicable rate" during spill conditions under the Exportable Energy Agreement, Northwest utilities find that they can economically generate more energy for export to California. Until 1984, BPA's "applicable rate" was very low, never exceeding 1.1 cents per kWh. At this low rate, the Exportable Energy Agreement acted as a market clearing mechanism for surplus hydropower; most thermal generation could not compete for space on the Intertie. Since the introduction of the Access Policy, however, the "applicable rate" has been much higher. Immediately upon adoption of the Policy, the "applicable rate" went to 1.85 cents per kWh. *U.S. Dep't of Energy, Bonneville Power Administration*, 39 FERC (CCH) ¶61,069, at p. 61,195 (1987); Letter from James L. Jones, Assistant Administrator for Power and Resources Management to Exportable Energy Agreement Signatories, August 20, 1984, A. at N2. A few months later, it was increased to 2.34 cents. BPA, 1985 Rate Proceeding, Administrator's Record of Decision, D-41, D-42 (1985). By doubling the "applicable rate" BPA actually sells *less* energy on the Intertie than it did when the rate was lower, because several thousand megawatts of nonfederal coal-fired generation can now compete for a pro rata share of the limited Intertie capacity.

Canadian sellers and thus enabled BPA to sell its surplus energy to California at substantially higher prices than the competitive market would allow.[11]

The 1984 Policy went beyond protecting BPA sales from competition, however. It also protects *each* Northwest utility seller of surplus energy from competition from (1) other Northwest sellers including BPA and (2) Canadian sellers. By eliminating such competition, the policy distributes most of the benefits of Intertie transactions to the Northwest sellers.[12]

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[11] The policy adopted in September 1984 was called the "Interim" or "Initial" Near Term Intertie Access Policy. A. at D3, E5, H1. BPA adopted this policy for a period of six months and stated its intent to adopt a "Near Term Intertie Access Policy" that would have a life of about 18 months, followed by a "Long Term Intertie Access Policy." A. at E5. The Long Term Policy is to be in effect indefinitely. A. at I6.

The Interim Policy was adopted after a notice and comment procedure in which BPA responded in a "Record of Decision" (ROD) to the written comments of interested parties. A. at E1-E2; *see* 42 U.S.C. §7191(d) (requiring a record of decision). BPA did not, however, provide any evidentiary support beyond conclusory statements in the ROD for key factual underpinnings of the Policy, including the critically important assertion that the Policy was necessary to permit BPA to meet its repayment obligations to the federal treasury. When BPA adopted its Near Term Policy in June, 1985, it released a second ROD which provided more response to comments but no further evidence relating to the necessity for the Policy. A. at H2-H3.

[12] The benefits of each Intertie transaction are the difference between (1) the costs the buyer avoids by substituting the purchased energy for some other energy source and (2) the costs the seller incurs to make the sale. During spill, for example, the costs the seller incurs are nearly zero; the costs the buyer avoids are the cost of another purchase that can be turned back, or the operating cost of its most expensive displaceable source of generation. The Access Policy permits sellers to price their energy just below the costs avoided by the buyer without fear of losing the sale to another seller. Thus, most of the difference between the seller's and buyer's costs can be captured by the seller under the Policy.

The Access Policy provides for transmission service for two types of power transactions: long-term "firm" sales and short-term (generally hourly) "nonfirm" sales. Most of BPA's Intertie capacity is allocated on a "nonfirm" basis, according to formulae that change depending on which of three "conditions" exists at any given time. During Conditions 1 and 2, BPA allocates the Intertie to itself and Northwest utilities only, and horizontally divides the market among those parties. During Condition 3, BPA allocates enough Intertie capacity to itself and Northwest utilities to allow transmission of all of the surplus energy those parties may have, and permits Canadian and California utilities to have direct access only to any remaining capacity.

Condition 1 exists when the 1969 "Exportable Energy Agreement" is in effect. As explained in footnote 8, this occurs during "spill" conditions when there is so much energy available that sellers in the Northwest could afford to offer their surplus energy at virtually any price, since it would be immediately wasted if not sold. Under Condition 1, each *Northwest* seller receives a fixed share of the Intertie based on its pro rata share of the available surplus, defined as only the electricity that Northwest utilities are willing to sell at the price BPA sets for federal energy. Additional energy that Northwest utilities would be willing to sell only at higher prices (*e.g.* more expensive thermal generation) is not included within the available surplus under Condition 1. A. at A6, B11-B12.

In most respects, Condition 1 operates as the Exportable Energy Agreement had operated before the Intertie Access Policy. In one key respect, however, the Policy is different. Where BPA had previously required Northwest sellers who received a pro rata allocation to sell their energy at BPA's market clearing rate,[13] BPA

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[13] The requirement that sellers actually sell at BPA's "applicable rate" was reflected in a 1982 BPA memorandum explaining the

now allows Northwest sellers under Condition 1 of the Policy to negotiate any price they can get after they receive their fixed shares.[14] The result is to remove the protection the buyers formerly enjoyed against nonfederal sellers using their fixed allocation to charge more than BPA's "applicable rate."

Condition 2 exists when spill is not imminent but there is still sufficient surplus Northwest energy to fill available Intertie capacity if energy that sellers are willing to offer above BPA's price is included as available surplus. Under Condition 2, each Northwest seller receives a fixed share of the Intertie based on its pro rata share of this different definition of available surplus. A. at A6-A7.

No utility outside the Northwest is provided any access to BPA Intertie capacity during Conditions 1 and 2. A. at

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operation of the Exportable Energy Agreement. This memorandum is quoted by the Ninth Circuit in *California Energy Comm'n v. Johnson*, 767 F.2d 631 (9th Cir. 1985):

> When a party schedules its apportioned "Exportable Energy" to BPA, such party's energy is combined with all other Exportable Energy, and sold by BPA as Federal energy to California utilities under existing power sales contracts at the lowest rate specified under BPA's Wholesale Nonfirm Energy Rate Schedule. The scheduling party is credited (i.e., paid) for its "sale" of Exportable Energy by BPA at the referenced rate.

767 F.2d at 634 (citation omitted).

[14] BPA's Environmental Assessment on the Proposed Near Term Intertie Access Policy, issued in February 1985, explains (at page 10):

> A party to [the Exportable Energy] Agreement may schedule under section 5(c) all or part of its apportioned share of an Exportable Energy schedule on a bilateral basis to a specific California entity at a price other than the "applicable rate."

Since each seller receives a fixed share of the limited Intertie, there is no incentive to reduce the price below the "applicable rate." Therefore, this provision simply allows sellers to use the applicable rate as a floor rate, above which they are free to exert their monopoly power over a fixed share of the Intertie.

A6-A7. This means that, under Conditions 1 and 2, purchases of Canadian or Northwest power can be made by California consumers only from the Northwest utilities which control the "tollgate" transmission capacity. Those Northwest utilities are thus empowered to act as unnecessary middlemen, who can use their exclusive access rights to purchase and resell electricity from outside the region — especially Canada — over the Intertie at a premium reflecting the value of their monopoly allocation.[15]

Condition 3 exists when BPA and other Northwest utilities lack sufficient surplus to fill the Intertie regardless of price. Under Condition 3, BPA apportions Intertie capacity first to itself and then to Northwest utilities that have surplus energy for sale. Any remaining capacity is then, and only then, made available to utilities outside the Northwest. A. at G21.

D. Ninth Circuit Review of the Access Policy

Just thirteen days after its adoption in September 1984, the Interim Policy was challenged by the Los Angeles Department of Water and Power (LADWP), which filed

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[15] BPA asserted in its Near Term Policy Record of Decision that the Policy "does not provide use of BPA Intertie capacity for arbitrage of extraregional power." A. at H32. BPA went on to admit, however, that the Policy does not prohibit purchase of Canadian power to displace Northwest resources. *Id.* The Proposed Near Term Policy issued in early 1985 was more candid, and stated that during implementation of the interim version of the Policy, approximately two-thirds of the Canadian energy previously sold directly to California reached that market indirectly through this artificial arbitrage or "tollgate" market. A. at F2. *Cf. Aluminum Co. of America v. Central Lincoln People's Util. Dist.*, 467 U.S. 380, 388 & n. 7 (1984) (finding that parties who purchased BPA nonfirm energy to "displace" their own generation which was then sold to others had conceded that they "arbitrage" the BPA energy).

an emergency request to stay the Policy. In pursuit of a prompt decision, LADWP agreed to forego normal briefing on the merits. After expedited oral argument, the Ninth Circuit issued a sweeping decision upholding the Policy. The court, apparently relying on a few short conclusory affidavits BPA filed in court to oppose LADWP's request for a stay, found that "BPA has presented reliable evidence that without a policy which carefully allocates Intertie access, it will experience significant revenue shortfalls in coming years." A. at B20. There was absolutely *no* evidence to that effect in the record created during BPA's notice and comment proceeding.

The *LADWP* panel found that the Policy limited competition (A. at B13), but held that, if restriction of competition was necessary to prevent BPA revenue deficits, such restriction was not only authorized, it was *mandated*. A. at B20. The court also held that the statutes requiring BPA to share excess transmission capacity with *all* utilities on a fair and nondiscriminatory basis authorize BPA to discriminate against Canadian and California utilities. In the *LADWP* panel's view, those statutes mandate a preference, not just for federal and Canadian Treaty power, but for Northwest utilities as well. A. at B25. The panel also dismissed as "frivolous" any duty by BPA to comply with antitrust policy "because the antitrust laws do not apply to the federal government." A. at B20 n. 12 (citation omitted). LADWP did not seek review by this Court of the decision.

Pursuant to the judicial review provisions of the Pacific Northwest Electric Power Planning and Conservation Act of 1980, 16 U.S.C. §839f(e)(5), the CEC and the CPUC filed their own challenges to the Interim Policy within the statutory 90 day time period.[16] The divided

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[16] Both agencies sought to consolidate these cases with *LADWP* in order to bring that decision directly to this Court for review, but BPA

panel which decided these challenges unanimously found that the Policy, in both its versions, is anticompetitive. Thus the majority opinion in *CEC* candidly stated that the Policy's pro rata allocation scheme creates

> a regularly shifting, horizontal division of the market for surplus nonfirm energy [whereby] each eligible producer is temporarily granted sole access to a specified share of the capacity, which it may either use or allow to remain unused without fear of competition by other producers.

A. at A16. Similarly, the dissent stated that:

> The BPA's pro rata allocation scheme for available intertie capacity — a scheme which if implemented by a private party would plainly violate the antitrust laws — paternalistically restricts price competition among Northwest utilities and denies Southwest utilities and energy consumers the benefit of free market pricing for surplus energy offered for sale by privately-owned Northwest utilities. The interim access policy's interference with free market pricing simply creates a cartel for the Northwest utility companies in the sale of power to the Southwest.

A. at A26 (footnote omitted).

Despite its recognition of the effects of the Policy, the *CEC* majority concluded that it was bound by the *LADWP* panel's conclusion that BPA was required to discriminate against utilities outside the Northwest in providing access to excess transmission capacity. A. at A14. The majority recognized that BPA has a duty as a federal agency to "consider" federal antitrust policies, but the court did not require BPA to show how it had harmonized those policies with the agency's fiscal needs,

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objected and the *LADWP* panel rejected our attempts to intervene or consolidate the cases. This problem would not occur under a new Ninth Circuit rule that automatically consolidates such cases. 9th Cir. R. 15-2.3(b).

or to demonstrate that BPA had sought to protect competition as much as possible. *See* A. at A15-A20. The majority also did not identify any specific statutory justification for BPA's elimination of competition among nonfederal sellers. However, noting several BPA arguments (including the claim that the Policy counters alleged "monopsony" power by California buyers), the court decided that given the state of the record on a temporary policy, consideration of more competitive alternatives should await review of the Long Term Policy.[17] A. at A17, A18.

Judge Norris sharply disagreed with the majority:

> I can see no statutory authority under which the BPA is authorized to discriminate so clearly in favor of Northwest utilities and against Southwest utilities and energy users. Indeed, the relevant statutory language appears to point the other way. The anti-competitive, pro-Northwest utility slant of the pro rata intertie access plan seems plainly incompatible with the statutory language requiring that the BPA be "fair and non-discriminatory" in its treatment of *all* utilities, 16 U.S.C. §838d, as well as the clear understanding recognized in *Department of Water & Power* that the purpose of the intertie was to benefit both the Northwest and Southwest, 759 F.2d at 694.

A. at A26-A27 (emphasis in original).

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[17] The Long Term Intertie Access Policy, originally scheduled for adoption in 1986, still has not emerged from BPA, though its release is said to be imminent.

Adoption of the Long Term Policy will not moot this case. As shown in the Appendix, both published drafts of the Long Term Policy have had the same anticompetitive features with respect to hourly sales of surplus nonfirm energy as did the Interim and Near Term Policies. That is, both drafts have granted to BPA and Northwest utilities, under Conditions 1 and 2, exclusive access to the federally owned portion of the Intertie and have also horizontally divided that access among those utilities. A. at I18-I22, J14-J18.

REASONS FOR GRANTING THE WRIT

This case involves the transfer of billions of dollars of wealth from electric utilities and consumers in California to electric utilities and consumers in the Pacific Northwest.[18] The transfer occurs because BPA's Intertie Access Policy horizontally divides the California market for Northwest electricity, eliminates competition for that market among Northwest energy sellers, and eliminates competition from other utilities (principally Canadian) who would also supply the California market if they could gain access to it. The Policy thus enables the Northwest utilities to raise the price they receive from California utilities. Neither panel of the Ninth Circuit has disputed that the scheme is anticompetitive and that it would be *per se* illegal if it were imposed by a private party. *See Copperweld Corp. v. Independence Tube Corp.*, 467 U.S. 752, 768 (1984).

This Court's review is required for two reasons. First, the plain language of the governing federal statutes prohibits discrimination in allocating Intertie transmission capacity. Yet the Ninth Circuit has held that

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[18] According to BPA's annual report for 1985 (the first full year in which the Policy operated), BPA collected approximately $400 million that year from California purchasers. BPA, 1985 Program and Financial Summary 33 (1985). This amount does not include substantial additional energy sold to California by Northwest nonfederal utilities. Although uncertainties in future weather conditions and fuel prices make it impossible to predict the precise impact of the Policy's restrictions on competition, the Near Term Policy ROD establishes that the Policy has been successful in achieving BPA's goal of substantially increasing its prices to California. The record shows that BPA's prices to California nearly doubled the year after the Policy took effect. A. at H23, H91. Over a period of several years, the Policy's restrictions on competition will certainly cost California ratepayers billions of dollars, particularly if California's alternative generation costs substantially increase due to oil or natural gas shortages. See also *supra* note 4.

discrimination is what the statutes *require*. Second, the Ninth Circuit has ignored this Court's well-settled rule that federal agencies must consider and balance antitrust policies in implementing their Congressional mandates.

The absence of a conflict in the circuits is irrelevant. BPA operates in only one circuit; hence there can never be a conflict. Because of the lower court's clear errors of law, and because of the enormous economic impact of those errors on California electric consumers, the issue merits consideration by more than one court.

I. BPA'S POLICY OF GRANTING PREFERENTIAL ACCESS TO NORTHWEST UTILITIES AND DISCRIMINATING AGAINST CALIFORNIA UTILITIES AND THEIR RATEPAYERS VIOLATES THE STATUTES REQUIRING BPA TO MAKE TRANSMISSION SERVICE AVAILABLE TO "ALL" UTILITIES ON A "FAIR AND NONDISCRIMINATORY" BASIS

Congress has required BPA to make Intertie capacity that it does not need for transmission of federal energy available "as a carrier" to "*all* utilities" on a "fair and nondiscriminatory" basis. 16 U.S.C. §837e provides (emphasis added):

> *Any capacity in Federal transmission lines connecting*, either by themselves or with non-Federal lines, a generating plant in *the Pacific Northwest or Canada with the other area or with any other area outside the Pacific Northwest*, which is not required for the transmission of Federal energy or [Canadian Treaty energy], *shall be made available as a carrier* for transmission of other electric energy between such areas.

16 U.S.C. §838d provides (emphasis added):

> The Administrator *shall* make available *to all utilities* on a *fair and nondiscriminatory basis*, any capacity in the Federal transmission system which he determines to be in excess of the capacity required to transmit electric power generated or acquired by the United States.

Despite the unequivocal requirement of these statutes that BPA be fair and not discriminate in providing access to its transmission lines, the Access Policy does precisely the opposite by granting priority to Northwest utilities and by shielding them from competition.

Sections 837e and 838d provide a two-tiered preference scheme based on the origin of the energy to be sold: first priority goes to federal energy and Canadian Treaty energy, and second priority goes to other nonfederal energy. The Ninth Circuit, however, found in the statutes a three-tiered preference scheme based on the identity of the utility desiring access: first, BPA and utilities desiring to transmit Canadian Treaty energy; second, Northwest nonfederal utilities; third, U.S. utilities located outside the Northwest, including those in California and Canada. A. at B25.[19] Neither the language of the statute, its legislative history, nor common sense supports this re-writing of the statute, which gives Northwest utilities a preference over other nonfederal electric utilities.[20]

The most fundamental canon of statutory construction is that "the starting point for interpreting a statute is the language of the statute itself. Absent a clearly expressed

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[19] The majority in *CEC* simply deferred to the *LADWP* panel's interpretation of these critical statutory provisions, based on the Ninth Circuit's rule of interpanel deference. A. at A14-A15.

[20] Thus the *LADWP* court has clearly erred in concluding that "BPA is required to allocate use of federally-owned transmission facilities in a manner which accords preference first to transmission of federal power *and then to transmission of other Northwest-generated power*." A. at B25 (emphasis added).

legislative intention to the contrary, that language must ordinarily be regarded as conclusive." *Consumer Product Safety Comm'n v. GTE Sylvania, Inc.*, 447 U.S. 102, 108 (1980). If the intent of Congress is clear from the statute, "that is the end of the matter." *Chevron, U.S.A., Inc. v. NRDC*, 467 U.S. 837, 842 (1984).

Rather than implementing the plain meaning of the statutes quoted above, the *LADWP* decision (by which the panel in the present case deemed itself bound) redefined BPA's statutory authority and justified doing so based on three passages of legislative history. First, the court selectively quoted the legislative history of section 837e as follows:

> [BPA] *may enter into agreements* for the wheeling of energy generated in Canada, but such energy . . . does not have the priority granted to Federal energy and Canada's entitlement to [treaty] power benefits . . . .

A. at B23 (emphasis and ellipses in the court's opinion). Focusing on the word "may," the panel concluded that BPA retains discretion to discriminate against direct Canada-to-California sales and may adopt a Northwest utility priority following the priority for federal energy. A. at B23. In reaching that conclusion, however, the *LADWP* court edited the legislative history's language in a way that turns the intended meaning of the statute on its head. The *unedited* language shows that Congress's intent was exactly the opposite:

> [BPA] may enter into agreements for the wheeling of energy generated in Canada, but such energy *stands on the same basis as any other non-Federal energy. It* does not have the priority granted to Federal energy and Canada's entitlement to [treaty] power benefits . . . .

H.R. Rep. No. 590, 88th Cong., 2d Sess., *reprinted in* 1964 U.S. Code Cong. & Admin. News 3342, 3350 (emphasis added to the portion omitted by the Ninth Circuit). Thus

Congress expressly indicated, in the very passage on which the *LADWP* panel purported to rely, that Canadian energy was not to be treated any differently from any other nonfederal energy. Canadian energy should therefore enjoy the same mandatory and nondiscriminatory access to BPA's excess Intertie capacity as the energy of any other nonfederal utility.

Second, the Ninth Circuit stated that the use of the word "may" in the above-quoted statement "is in contrast to the immediately prior paragraph in the legislative history which *requires* BPA to make excess Intertie capacity available to other non-Federal utilities." A. at B23 (emphasis in original). A review of the "prior paragraph," however, reveals no distinction between Canadian and other nonfederal energy.[21]

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[21] The full text of this paragraph, which the court in *LADWP* characterized but did not quote, provides:

> Excess capacity in any Federal transmission lines interconnecting the Pacific Northwest with another marketing area is made available for wheeling non-Federal energy. Federal energy and downstream power benefits to which Canada would be entitled under the proposed treaty would have priority to the use of Federal lines. Wheeling agreements on either an excess capacity basis or a firm basis are authorized. However, if the wheeling agreement is on a firm basis the existence of excess capacity will be determined and frozen at the time the wheeling contract is executed. Thereafter, the energy of any party for whom the Secretary has agreed to wheel, cannot be displaced by any subsequent increase in the needs of the Federal Government or in the amount of Canadian energy which would be transmitted. Similarly the energy which the Secretary has agreed to wheel cannot be displaced by energy of others for whom the Secretary subsequently might agree to wheel. In determining the existence of capacity excess to the needs of the Government, Federal needs reasonably foreseeable may be included, but the Secretary may not decline to enter into a wheeling agreement merely because he may have energy available for sale to serve the same load.

H.R. Rep. No. 590, 88th Cong., 2d Sess., *reprinted in* 1964 U.S. Code

Third, the court cited a quotation from the legislative history of section 838d to the effect that the statutory requirement that BPA provide transmission service to all utilities on fair and nondiscriminatory terms "is not intended to represent a policy having application other than in the Pacific Northwest." A. at B23 (quoting H.R. Rep. 93-1375, 93d Cong., 2d Sess., *reprinted in* 1974 U.S. Code Cong. & Admin. News 5810, 5814). There is only one reading of this quotation that is consistent with the plain language of the statute: Congress intended that the duty to provide nondiscriminatory service to all utilities would apply only to BPA transmission lines (all of which are within the Northwest), and would not therefore affect the obligations of federal agencies operating outside the Northwest.[22] By contrast, the *LADWP* panel's reading of this snippet from a House Report rewrites the express legislative command that all utilities are to be protected against discrimination. In the Ninth Circuit's view, "all" does not mean all. And unfortunately, the issue can never be presented to any other circuit.

The *LADWP* court also found support for BPA's discrimination in its view that "Congress intended that the Intertie be used primarily for the benefit of Northwest and Southwest utilities and not for the benefit

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Cong. & Admin. News 3342, 3350.

[22] The parallel Senate Committee Report supports this reading:

> Section 6 provides that the Administrator of the Bonneville Power Administration shall not discriminate among classes of customers in making agreements to transmit electric power over Federal transmission lines. The intention of this provision is to enable the Administrator to carry out the responsibilities assigned to him in this measure. *It is not the Committee's intention to make an expression of Congressional policy regarding the transmission of energy over Federal systems outside the Pacific Northwest.*

Sen. Rep. No. 93-1030, 93d Cong., 2d Sess. 10 (1974) (emphasis added).

of Canadian utilities." A. at B23. This reasoning is doubly flawed. First, aside from the preference for the transmission needs of the United States and Canadian Treaty power, the statute requires that *all* utilities be treated on a fair and nondiscriminatory basis. There is no exception for Canadian utilities. Second, discrimination against Canadian energy harms California consumers — intended beneficiaries of the federal Intertie investment — by reducing the number of competitors in the market and by making inexpensive Canadian energy available to California only on a "pass through" or arbitrage basis.

II. THE NINTH CIRCUIT'S OPINIONS AND BPA'S ACTIONS CONFLICT WITH THIS COURT'S HOLDINGS THAT FEDERAL AGENCIES HAVE A DUTY TO CONSIDER AND WEIGH THE ANTICOMPETITIVE IMPACTS OF THEIR ACTIONS AND TO CONFORM THEIR POLICIES TO THE ANTITRUST LAWS TO THE MAXIMUM EXTENT FEASIBLE

All six judges of the Ninth Circuit who have reviewed the Access Policy have found it anticompetitive.[23] BPA has granted one group of private competitors and denied another access to a "tollgate" facility (see *United States v. Terminal R.R. Ass'n*, 224 U.S. 383 (1912)), and has insulated the former group from price competition among themselves. However, the Ninth Circuit has failed to require BPA to make any meaningful showing that these extreme anticompetitive effects of the Policy are necessary to achieve any legitimate statutory objective.

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[23] A. at A16, A26, B13; *see also* A. at E78 (BPA indicates that under the Access Policy "buyers in California face Pacific Northwest sellers who are unable to compete with each other . . .").

Federal agencies charged with regulating carriers and utilities, including the electric power industry, must accord careful consideration to "the fundamental national economic policy expressed in the antitrust laws." *Gulf States Utilities Co. v. Federal Power Comm'n*, 411 U.S. 747, 759 (1973); *see also Federal Maritime Comm'n v. Svenska Amerika Linien*, 390 U.S. 238, 244 (1968); *McLean Trucking Co. v. United States*, 321 U.S. 67, 80 (1944); *Maryland People's Counsel v. FERC*, 761 F.2d 780, 786-87 (D.C. Cir. 1985); *City of Huntingburg v. Federal Power Comm'n*, 498 F.2d 778, 783 (D.C. Cir. 1974). Even where other economic, social, or political considerations are found to be of sufficient importance to justify deviation from antitrust principles, those agencies may not take such action without conforming their conduct, to the maximum feasible extent, to antitrust policies. *See Latin America/Pacific Coast Steamship Conf. v. Federal Maritime Comm'n*, 465 F.2d 542, 547 (D.C. Cir.), *cert. denied*, 409 U.S. 967 (1972); *Northern Natural Gas Co. v. Federal Power Comm'n*, 399 F.2d 953, 961 (D.C. Cir. 1968). This requirement reflects the fact that the antitrust laws "are as important to the preservation of economic freedom and our free enterprise system as the Bill of Rights is to the protection of our fundamental personal freedoms." *324 Liquor Corp. v. Duffy*, ___ U.S. ___, 107 S.Ct. 720, 729 (1987), *quoting United States v. Topco Associates, Inc.*, 405 U.S. 596, 610 (1972).

The obligation to consider antitrust principles in formulating and implementing federal policy applies with special force to federal power marketing administrations such as BPA, which were established to sell federal electricity at inexpensive prices, thereby providing a "yardstick" to encourage competitive pricing by privately owned utilities.[24] BPA's enabling statutes in particular

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[24] BPA, *Columbia River Power For The People: A History Of The Policies Of The Bonneville Power Administration* 26 (1981).

demonstrate a consistent Congressional intent to foster rather than restrain competition.[25]

The Ninth Circuit did not deny the severe anticompetitive consequences of the Access Policy. It simply tried to justify these violations of antitrust principles based on the alleged need for increased BPA revenues. A. at B20. Yet it is very clear, both from BPA's own Record of Decision and from the *LADWP* and *CEC* opinions, that the Policy does not simply protect BPA's sales of surplus energy from competition; it also protects all nonfederal sellers from competition from Canada, among themselves, and even from BPA. A. at E78; A. at A16, A26, B13. While protecting *federal* energy sales from competition may increase federal revenues, neither of the Records of Decision nor the two Ninth Circuit opinions has even remotely suggested how protecting *nonfederal* energy sales from competition has anything to do with BPA's mandate to be a self-financing agency.[26]

Moreover, BPA has alternative ways of enhancing its revenues which are either less anticompetitive or not anticompetitive at all. For example, BPA could raise its rates to its Northwest customers in order to recover a higher percentage of its total costs from the customers

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[25] *See, e.g.*, 16 U.S.C. §832a(b) ("to prevent monopolization"); 16 U.S.C. §825s (made applicable through 16 U.S.C. §839e(a)(1)) ("to make [federal energy] available . . . on fair and reasonable terms and conditions" and "at the lowest possible rates to consumers consistent with sound business principles"); 16 U.S.C. §838d (excess transmission capacity shall be made "available to all utilities on a fair and nondiscriminatory basis"); 16 U.S.C. §838g ("consistent with sound business principles"); 16 U.S.C. §839e(a)(1) (BPA rates to be set "in accordance with sound business principles").

[26] Even with respect to its own sales, BPA has not shown that it needs to act anticompetitively in order to maintain adequate revenues, nor has BPA shown that the method it has chosen to achieve its revenue goals is the least anticompetitive action available consistent with its revenue needs.

who receive high quality firm power from BPA.[27] It could also exercise the express priority over transmission capacity that Congress provided in sections 837e and 838d in order to ensure that all federal energy could be sold to produce needed federal revenue.[28] BPA could also consider a more limited protection of its sales from competition (e.g. restricting competition only during spill periods, or only when market conditions would not permit BPA to recover a FERC-approved cost-based surplus energy rate). It is only because BPA has decided (1) to keep its rates to Northwest utilities low, (2) to sell only a "pro rata" share of its own energy, and (3) to ignore alternatives that restrict competition to a lesser degree, that BPA deems it necessary to adopt a total

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[27] BPA's mandate to be self-financing is simply the obligation to recover enough revenues from *all* of its power sales to repay its treasury obligations within a reasonable time. 16 U.S.C. §839e(a)(1). BPA has not been established to make a profit; rather, it sells its power at cost "at the lowest rates to consumers consistent with sound business principles." 16 U.S.C. §§838g, 839e(a)(1). However, within this statutory framework, BPA must decide how much of its total costs must be recovered from its firm power customers and how much must be recovered from sales of surplus energy. 16 U.S.C. §839e(g). Therefore, BPA's obligation to be a self-financing agency involves a zero sum game: every increase in the rates charged to California permits a decrease in the rates charged to the Northwest, and vice versa. We do not suggest that this Court needs to become involved in the intricacies of BPA ratemaking in this case. We do submit, however, that BPA may not double its rates to California (to the benefit of the Northwest) by horizontally dividing up the market for sales of surplus energy to California, without demonstrating how every anticompetitive consequence of that action is both (1) necessary to protect BPA's ability to recover adequate revenues and (2) the least anticompetitive alternative available for that purpose.

[28] The question here is why BPA should be permitted to violate Congress's antitrust policies when it has not even made full use of the express power Congress provided to reserve Intertie capacity so that BPA could sell all of its own energy.

restriction on competition for sales of energy to California.

Although BPA does not expressly articulate it as an independent rationale for the elimination of competition among the nonfederal utilities, the implication in the Interim Policy Record of Decision is that BPA took this action to counter an alleged lack of competition among California buyers of surplus Northwest energy. A. at E75-E79; *see also* A. at A18-A19. If this was BPA's justification, it is insufficient for several reasons.

First, BPA is *not* a regulatory agency.[29] FERC regulates the wholesale electricity market in the Northwest and California, not BPA. *See New England Power Co. v. New Hampshire*, 455 U.S. 331, 340 (1982). Congress has not delegated to BPA the authority to exercise governmental police powers for the purpose of regulating alleged anticompetitive conduct by others. As stated by Judge Norris, "BPA's statutory mission . . . does not extend to acting as the guardian angel for Northwest utilities in their market relationship with Southwest utilities." A. at A26.

Second, BPA ignored the well-settled rule that those who commit antitrust violations may not justify such conduct on the ground that it was undertaken to compensate for or retaliate against antitrust violations by their adversaries. *Perma Life Mufflers, Inc. v. International Parts Corp.*, 392 U.S. 134, 138 (1968); *Kiefer-Stewart Co. v. Joseph E. Seagram & Sons*, 340 U.S. 211, 214 (1951). As Judge Norris observed:

> If Northwest energy companies believe that the Southwest utilities are exercising some sort of unfair

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[29] BPA quite clearly has only those powers delegated to it by Congress: "[An agency] is entirely a creature of Congress and the determinative question is not what [the agency] thinks it should do but what Congress has said it can do." *Civil Aeronautics Board v. Delta Air Lines, Inc.*, 367 U.S. 316, 322 (1961).

> monopsony power, let them sue under the applicable antitrust laws. It is not the mission of the BPA to fight this battle for the Northwest utilities through the promulgation of a regionally biased access policy.

A. at A26.

Third, as discussed at pages 4-6, *supra*, the southern end of the Intertie, unlike the northern end, was paid for and is owned by nongovernmental entities, who have not been obliged to make their capacity available to non-owners.[30] Moreover, to the extent that BPA's complaint relates to its inability to reach potential customers in California, BPA has no legitimate grievance. According to testimony given during the Quad-7 proceeding by Charles Luce (BPA Administrator from 1961 to 1966), the idea of limiting California utility Intertie participation to large generating utilities actually came from BPA itself and related to its political concerns about regional versus public preference. A. at L13-L16.

Finally, the Ninth Circuit's failure to require BPA to consider less anticompetitive alternatives violated the

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[30] In the Quad-7 Initial Decision, the administrative law judge pointed out that requiring "owner" utilities to surrender their Intertie shares to "non-owners" would not necessarily produce a fair result:

> The costs to and rates charged by the various municipalities may be reduced if access to the Intertie is given them, but there will be a corresponding increase in the cost to PG&E and Edison and an increase in their rates to cover the cost increase assuming full retail rate recovery of costs. The stockholders of PG&E and Edison will not lose money, nor will the executives of PG&E and Edison have their salaries reduced. Essentially what we deal with here is the question of whether the consumers supplied by the municipalities will have their rates reduced while other customers of PG&E and Edison find their rates increased.

A. at L10. In this case, it is also the ratepayers of PG&E and Edison (as well as of the various other California utilities which own portions of the Intertie) who are hurt by the Access Policy.

well-established principle that agencies must consider *on their own initiative* whether such alternatives exist. As the D.C. Circuit said in *Northern Natural Gas Co.*:

> [T]he duty imposed upon the Commission by Section 7 of the Natural Gas Act is not merely to determine which of the submitted applications is most in the public interest, but also to give proper consideration to logical alternatives which might serve the public interest *better* than any of the projects outlined in the applications.

399 F.2d at 973 (footnote omitted, emphasis in original); *see also Maryland People's Counsel*, 761 F.2d at 786; *City of Huntingburg*, 498 F.2d at 788; *Marine Space Enclosures, Inc. v. Federal Maritime Comm'n*, 420 F.2d 577, 585 (D.C. Cir. 1969); *cf. United States v. Third National Bank*, 390 U.S. 171, 189-92 (1968).

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Congress has recognized only two exceptions — for federal and Canadian Treaty energy — to the requirement that BPA allocate Intertie transmission capacity on a nondiscriminatory basis. Even if that governing language were not so clear, the undisputable anticompetitive consequences of the respondent's allocation must, under this Court's precedents, have some bearing on how the statute is to be interpreted. Yet the Ninth Circuit has disregarded both the plain language of the statute and also the well-settled rule that federal legislation should be interpreted and implemented so as to harmonize antitrust and regulatory principles.

The economic consequences of the Ninth Circuit's error amount potentially to billions of dollars. Clearly, the issue is too important to leave exclusively to one court as the first and last judicial body to pass on the matter.

CONCLUSION

The Court should grant the Petition for a Writ of Certiorari.

Respectfully submitted,

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